

Heftel does not disagree with the basic premise of the Cited Cases--namely, that the Commission may adopt administrative regulations such as filing deadlines to allow for the orderly processing of rule making petitions or applications. See, Ashbacker v. FCC, 326 U.S. 327, 333 at n.9 (1945). Should the Commission adopt such regulations, however, it must give clear notice to prospective applicants as to what is being cut-off. See Ridge Radio Corp. v. FCC, 292 F.2d 770, 773 (D.C. Cir 1961) ("Ridge Radio"). In that case the Court held that the Commission may not give public notice of a cut-off date which does not fairly advise prospective applicants of what is being cut-off by the notice. Ridge Radio at 773. Similarly, the Commission must give appropriate notice of a policy whereby a petition for rulemaking is dismissed if an applicant files--or, as in this case, refiles after cancellation--for an allotment which the petition seeks to modify or delete. Reeder v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989) ("Reeder"). There is no authority, rule, or rulemaking for the policy relied on by the Joint Applicants in the Cited Cases.

The policy contained in the Cited Cases (if correctly summarized by the Joint Applicants) is a fait accompli, because no notice was given, nor was there an adequate opportunity for comment on the policy apparently advanced by the Allocations Branch in the Cited Cases. To the extent the Cited Cases represent current Commission policy, it cannot withstand the notice and comment requirements of Section 553(b) Administrative Procedure Act. Reeder at 1304. Moreover, even if the Commission had given notice or has a policy which might cut off Heftel's Petition from consideration on the merits, that notice or policy could not stand given the requirements of Ridge Radio and Reeder for clear and unambiguous notice, as well as the opportunity for comment.

### III. Metro's Other Arguments

In addition to the foregoing arguments advanced by the Joint Applicants relating to alleged procedural defects in the consideration of Heftel's Petition by the Allocations Branch and the MMB, Metro advances the following other arguments:

#### A. Metro's "Curative Amendment"

Metro claims that its "curative reimbursement commitment" entitles it to have its counterproposal considered in this proceeding.<sup>20/</sup> Heftel disagrees for the reasons articulated in the Report and Order at Paragraph 6.

#### B. The Heftel/Snyder Agreement

Metro claims that Heftel's agreement with Snyder has not cured the alleged defects in its proposal.<sup>21/</sup> Heftel's settlement with Snyder is, as Snyder writes, "dead as a doornail."<sup>22/</sup> Heftel's Petition now stands on its own merits, and without regard to the defunct agreement with Snyder. Metro's argument is therefore irrelevant.

#### C. Metro's Disagreements with Snyder

Metro states that Snyder's Application for Review "inaccurately depicts the relationship between Heftel's Rule Making Petition and the Snyder application."<sup>23/</sup> Heftel's

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<sup>20/</sup> Metro Application, pages 5-9.

<sup>21/</sup> Metro Application, pages 14-16.

<sup>22/</sup> Snyder's Application, page 5.

<sup>23/</sup> Metro Application, page 16.

comments regarding Snyder's Application for Review are set forth herein.

D. Heftel's Proposal to Serve the Community of Robinson, Texas

Metro claims that "Heftel's proposal should be denied because the community of Robinson [Texas] is not entitled to a first local service preference." (emphasis added)<sup>24/</sup> Metro does not contend that Robinson is a "community" for basic FM allotment purposes. Rather, Metro contends that, contrary to the conclusion reached by the Allocations Branch (see Report and Order, Paragraph 8), Heftel's proposal to serve Robinson is not entitled to a "first local service" preference vis-a-vis under the allocation criteria established in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982), recon. denied, 56 RR 2d 448 (1984). Metro then contends that because Robinson does not deserve a preference for "first local service," the proposal to substitute Channel 300A for Channel 300C1 at Corsicana and reallocate the channel to Robinson would not serve the public interest and, for that reason, Heftel's Petition should be denied, without consideration of the other public interest aspects of Heftel's proposal. Metro Application, pages 23-24.

The NPRM noted (Paragraph 4) that the proposed Robinson allotment would provide a 70 dBu signal to 70% of the Waco Urbanized Area, and directed Heftel to provide information regarding the "first local service preference" under RKO General (KFRC), 5 FCC Rcd 3222 (1990). Heftel submitted information in response to this directive in its Comments (pages 4-10, and

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<sup>24/</sup> Metro Application, pages 17-24.

Attachment 1, Declaration of Jane Gilmore (with attachments thereto)). To the extent that Metro disputes that Heftel has made a sufficient showing relating to the award of a preference for its proposal to bring a first service to serve Robinson, Metro is incorrect for the reasons stated in the Report and Order at Paragraph 8, and for the other reasons stated in Heftel's Comments.<sup>25/</sup>

However, Metro goes further and insists that the Commission must compare Heftel's proposal to allot Channel 300A to serve Robinson with the current use of Channel 300C1 at Corsicana. According to Metro, because Robinson does not deserve a "preference" as a "first local service," this aspect of Heftel's proposal would not serve the public interest and, for that reason alone, Heftel's Petition should be denied without consideration of the public interest merits of the other aspects of Heftel's proposal. Metro Application, pages 22-23. In other words, Metro's position is that in a complex rule making proceeding, which includes several channel substitutions and reallocations, the petition must not be considered as a unit; rather, the elements of the petition must be considered separately, and the petition must be denied unless each and every element, taken separately, would better serve public interest than the status quo.

Of course, that is not the law. The Commission routinely analyzes complex petitions for FM rule making based on the public interest implications of all the relevant parts, taken together, and does not insist that each element provide enhanced service to the public. The approach

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E.g., the City of Robinson covers 48 square miles. Declaration of Jane Gilmore, page 5. Robinson has its own local government with elected officials (a mayor and a five-member city council) (Id., page 2), a police force of 16 and a volunteer fire department (Id., page 3), and a school district with three elementary schools, a junior high school, and a high school (Id., pages 3-4). It has a family restaurant and several "fast food" restaurants (Id., page 3), a grocery store (Id., page 3), convenience stores (Id., page 3), three businesses with more than 30 employees (Id.), a bank (Id.), a water treatment plant (Id.), a Chamber of Commerce (Id., page 4), an Economic Development Committee (Id.), and a Lions Club (Id.). Robinson has a medical clinic for general practice (Id., pages 2-3) and a dental clinic. Id., page 3. Robinson also has 16 churches, representing seven faiths and approximately 75 small businesses (Statement of Linda Vranich, Secretary for the City of Robinson).

suggested by Metro could lead to the denial of a proposal which, taken as a whole, would provide large public service gains, solely because one aspect of the proposal would result in a small decrease in service to the public. That result obviously makes no sense at all.

In support of its contention to the contrary, Metro refers to the decision of the Allocations Branch in Greenfield and Del Rey Oaks, California, 11 FCC Rcd 12681 (1996) (“Del Rey Oaks”).<sup>26/</sup> Metro’s reliance on Del Rey Oaks is clearly misplaced. In that proceeding the sole issue was whether the Commission should substitute one channel for another channel and reallocate the channel from one community (Greenfield) to another community (Del Rey Oaks). No other proposals were involved in the proceeding, and so the decision was based solely on a comparison of the allocation at Greenfield with the proposed allocation at Del Rey Oaks under FM Priorities.<sup>27/</sup> Therefore, Del Rey Oaks offers no support for Metro’s contention that if the proposed allotment to Robinson is not preferred to the current allotment to Corsicana, Hefel’s Petition must therefore be denied, without consideration of the other aspects of its proposal.<sup>28/</sup>

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<sup>26/</sup> Metro Application, pages 22-23.

<sup>27/</sup> Metro’s claim (Metro Application, page 22, note 42) that the Allocations Branch refused to consider the public interest implications of other allotment possibilities in the context of making the Greenfield and Del Rey Oaks decision is based on footnote 7 in Del Rey Oaks which reads as follows: “Petitioner’s suggestion that the change of community would enable three new Class A allotments to be made at the communities of Greenfield, Harmony, and Pinedale, California, does not change the outcome of our decision.” (emphasis supplied) Metro has obviously read far too much into this ambiguous comment. Rather than indicating that the Allocations Branch refused to consider the merits of the proposals “suggested” by the petitioner because they were irrelevant, it appears as though the petitioner did nothing more than “contend” that if the allotment was made to Del Rey Oaks it “will make possible” other allotments (Id., page 12682), but never submitted concrete proposals for the hypothetically available allotments.

<sup>28/</sup> Moreover, Section 307(b) requires that Hefel’s Petition must be assessed in its totality under FM Priorities, with due recognition given to all of its component parts, and compared with all other timely-filed and valid counterproposals. Even if the Commission were to conclude that Hefel’s proposal to provide service to Robinson does not warrant a preference for first local service, and does not take priority over the current allotment at Corsicana, there can be no dispute that Hefel’s proposal, considered as a whole, would provide better service to the public than would Snyder’s proposal, whether taken alone or in combination with Metro’s proposal.

### CONCLUSION

For the foregoing reasons, Heftel submits that the Snyder Application for Review and the Metro Application for Review should be denied, and that the proposed modification of the FM Table of Allotments as set forth in Heftel's Petition and at the outset of this pleading should be adopted.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

A handwritten signature in black ink, appearing to read "Roy R. Russo", is written over a horizontal line.

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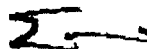
Dear Larry:

In a Report and Order released by the Commission on August 21, 1998, in MM Docket Nos. 97-26 and 97-91, the Chief of the Allocations Branch ruled that a counterproposal filed by my client, Graham Newspapers, Inc., after the comment date in the aforementioned rulemaking proceeding was "unacceptable for consideration in the context of this proceeding."

To the best of my knowledge, the proposal of Graham Newspapers, Inc. for operation of Station KWKQ on Channel 296C2 is still pending before the Commission. Neither the Commission nor the Mass Media Bureau has advised Graham Newspapers, Inc. that its proposal is no longer under consideration.

Best regards.

Cordially,



Erwin G. Krasnow

cc: James Gray  
Jack Sellmeyer

## **CERTIFICATE OF SERVICE**

I, Linda Stewart, an Administrative Assistant in the law firm of Cohn and Marks, hereby certify that on the 9th day of October, 1998, copies of the foregoing "Consolidated Opposition to Applications for Review" were mailed first-class, postage prepaid, to the following:

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